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AMFRASER SECURITIES PTE LTD v. POH GAIK LYE

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
AHMAD MAAROP FCJ
B ZAINUN ALI FCJ
[CIVIL APPEAL NO: 03(i)-3-08-2013(B)]
20 APRIL 2016

C ***BANKRUPTCY:*** *Bankruptcy notice – Setting aside – Summary judgment – Notice issued more than six years after judgment without prior leave of court – Whether notice bad in law – Whether judgment creditor not 'a person who is for the time being entitled to enforce a final judgment' – Whether leave imperative and must be applied for – Whether bankruptcy notice ought to be set aside – Rules of the High Court 1980, O. 46 r. 2(a) – Bankruptcy Act 1967, proviso to s. 3(1)*

D ***CIVIL PROCEDURE:*** *Leave – Leave to issue bankruptcy notice – Issuance of notice six years after judgment – Whether must obtain leave of court – Whether judgment creditor not 'a person who is for the time being entitled to enforce a final judgment' – Rules of the High Court 1980, O. 46 r. 2(a) – Bankruptcy Act 1967, proviso to s. 3(1)*

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This was an appeal against the decision of the Court of Appeal in overruling the High Court and reinstating the decision of the Senior Assistant Registrar ('SAR') who had set aside the bankruptcy notice ('notice') which the judgment creditor (appellant) had issued against the judgment debtor (respondent). The facts were that on 10 July 1998, the appellant obtained a F summary judgment against the respondent for RM11 million, and on 18 December 2008, or some ten years and five months later, the appellant caused the notice to be issued against the respondent. It was not in dispute that the notice was issued without any leave of court. Be that as it may, the respondent thereafter applied to set aside the notice, whereof the application G was allowed by the SAR. It was the view of the SAR, in setting aside the notice, that the notice, having been issued more than six years after judgment, had contravened O. 46 r. 2 Rules of the High Court 1980 ('RHC') and was on that score invalid. On appeal, the High Court however overturned the decision of the SAR, and reinstated the Notice, relying on the authority of H the Federal Court in *Perwira Affin Bank v. Lim Ah Hee* (followed by another panel of the Federal Court in *AmBank (M) Bhd v. Tan Tem Son & Another Appeal*) which ruled that a bankruptcy notice was not 'a writ of execution' and that the phrase 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s. 3(1) of the Bankruptcy Act 1967 did I not require a judgment creditor such as the appellant to obtain leave under O. 46 r. 2 prior to initiating a bankruptcy proceeding based on a final judgment. The respondent appealed and successfully persuaded the Court of Appeal to overrule the High Court, principally on the grounds that: (i) the

order extending the validity of the notice was vitiated by a fatal defect; (ii) the application to amend the order and rectify the defect was bad as it was made three months after the respondent had made her application to set aside; and (iii) the service of the notice by way of substituted service was bad in law. Being dissatisfied, the appellant obtained leave to appeal and posed three questions of law pertaining, *inter alia,* to the validity of the notice for the consideration of the learned justices of the apex court.

Held (declining to answer questions of law posed; dismissing appeal)
Per Ahmad Maarop FCJ delivering the judgment of the court:

(1) There is a reason (independent of the reasons given by the Court of Appeal in its judgment) which is fundamental in nature on account of which the decision of the High Court reinstating the notice could not stand. This is in respect of the fact that the notice was issued without complying with O. 46 r. 2 of the RHC. This critical issue was not dealt with by the Court of Appeal. (paras 12 & 15)

(2) *AmBank Bhd v. Tan Tem Son & Another Appeal* was reconsidered by a different panel of this court in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* where the later panel declined to follow *AmBank Bhd.* In *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* this court held that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed must obtain the prior leave of court pursuant to O. 46 r. 2 of the RHC. (para 15)

(3) As was said in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd*, a person 'who is for the time being entitled to enforce a final judgment' in the proviso to s. 3(1) of the Bankruptcy Act 1967 must be a person who is entitled to enforce a final judgment without prior leave of court. If when the bankruptcy notice is issued, the judgment was more than six years old, then the judgment creditor is not in a position to execute the judgment without the prior leave of court. In such a case, leave under O. 46 r. 2 must be obtained. (para 16)

(4) The notice in the present appeal was issued some ten years and five months after the judgment was obtained. Applying the law as pronounced by this court in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd*, the eventual outcome of the appeal is inevitable. The appellant was not a person for the time being entitled to enforce a final judgment in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 and leave under O. 46 r. 2 of the RHC should have been obtained. Since no such leave was obtained, the appellant was not in a position to execute the judgment and hence was not entitled to issue the notice. On this ground alone, the notice ought to be set aside. (para 16)

A ***Bahasa Malaysia*** *Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan kerana mengakas keputusan Mahkamah Tinggi dan mengesahkan keputusan Penolong Kanan Pendaftar ('PKP') yang mengetepikan notis kebankrapan ('notis') yang difailkan oleh pemiutang penghakiman (perayu) terhadap penghutang
B penghakiman (responden). Faktanya adalah bahawa pada 10 Julai 1998 perayu telah memperoleh penghakiman terus berjumlah RM11 juta terhadap responden, dan pada 18 Disember 2008, iaitu kira-kira sepuluh tahun lima bulan kemudian, perayu memfailkan notis terhadap responden. Tidak dinafikan bahawa notis dikeluarkan tanpa keizinan mahkamah. Apapun,
C responden kemudian memohon untuk mengetepikan notis, di mana permohonan tersebut dibenarkan oleh PKP. Adalah menjadi pandangan PKP, dalam mengetepikan notis, bahawa oleh kerana Notis dikeluarkan selepas enam tahun dari tarikh penghakiman terus, maka ia melanggar A. 46 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan sekaligus adalah
D tidak sah. Di peringkat rayuan, Mahkamah Tinggi bagaimanapun menolak keputusan PKP, dan mengekalkan notis, dengan bergantung kepada autoriti Mahkamah Persekutuan di dalam *Perwira Affin Bank v. Lim Ah Hee* (diikuti oleh satu panel lain Mahkamah Persekutuan di dalam *AmBank (M) Bhd v. Tan Tem Son & Another Appeal*) yang memutuskan bahawa notis kebankrapan
E bukanlah satu 'writ pelaksanaan' dan bahawa ungkapan 'mana-mana orang yang pada masa itu berhak untuk melaksanakan satu penghakiman muktamad' di dalam proviso kepada s. 3(1) Akta Kebankrapan 1967 tidak bermaksud bahawa seseorang pemiutang penghakiman seperti perayu harus terlebih dahulu mendapatkan izin di bawah A. 46 k. 2 sebelum memulakan
F prosiding kebankrapan yang berdasarkan kepada satu penghakiman muktamad. Responden merayu dan berjaya meyakinkan Mahkamah Rayuan untuk menolak keputusan Mahkamah Tinggi, secara pentingnya atas alasan-alasan berikut, iaitu: (i) perintah melanjutkan kesahan notis dikotori oleh kecacatan yang memudaratkan; (ii) permohonan untuk meminda perintah dan membaiki kecacatan tidak sah kerana dibuat tiga bulan selepas responden
G membuat permohonan untuk pengetepian; dan (iii) penyerahan notis melalui penyerahan ganti juga tidak sah di sisi undang-undang. Merasa tidak puas hati, perayu mendapat keizinan untuk merayu dan berikutnya mengemukakan tiga soalan undang-undang berkaitan antara lain dengan kesahan notis untuk pertimbangan yang arif hakim-hakim mahkamah
H tertinggi.

Diputuskan (enggan menjawab soalan undang-undang yang dikemukakan; menolak rayuan)
Oleh Ahmad Maarop HMP menyampaikan penghakiman mahkamah:

I **(1)** Terdapat satu sebab penting (di luar alasan-alasan yang diberi oleh Mahkamah Rayuan dalam penghakimannya) yang menyebabkan keputusan Mahkamah Tinggi dalam mengekalkan notis tidak dapat

dipertahankan. Ini adalah berhubung dengan fakta bahawa notis dikeluarkan tanpa mematuhi A. 46 k. 2 KMT. Isu kritikal ini tidak dipertimbangkan oleh Mahkamah Rayuan.

(2) *AmBank Bhd v. Tan Tem Son & Another Appeal* telah dipertimbang semula oleh satu panel lain mahkamah ini di dalam *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* di mana panel terkemudian tersebut enggan mengikuti *AmBank Bhd*. Di dalam *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* mahkamah ini memutuskan bahawa seorang penghutang penghakiman yang memulakan prosiding kebankrapan selepas enam tahun berlalu mesti terlebih dahulu mendapatkan kebenaran mahkamah di bawah A. 46 k. 2 KMT.

(3) Seperti yang dikatakan di dalam *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd*, seorang yang merupakan 'mana-mana orang yang pada masa itu berhak untuk melaksanakan satu penghakiman muktamad' di dalam proviso kepada s. 3(1) Akta Kebankrapan 1967 hendaklah seorang yang berhak menguatkuasakan penghakiman muktamad tanpa kebenaran terdahulu mahkamah. Jika, bilamana notis kebankrapan dikeluarkan, penghakiman sudah berusia lebih dari enam tahun, maka pemiutang penghakiman sudah tidak berada dalam kedudukan yang membolehkannya melaksanakan penghakiman tanpa kebenaran terdahulu mahkamah. Maka dalam kes sedemikian, kebenaran di bawah A. 46 k. 2 mestilah diperolehi.

(4) Notis dalam rayuan di sini dikeluarkan lebih kurang sepuluh tahun lima bulan selepas penghakiman terus diperolehi. Mengguna pakai undang-undang seperti yang diputuskan oleh mahkamah ini di dalam *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd*, keputusan terakhir rayuan ini adalah jelas. Perayu bukanlah orang yang pada masa itu berhak untuk menguatkuasakan suatu penghakiman muktamad seperti yang dikatakan oleh proviso kepada s. 3(1) Akta Kebankrapan 1967 dan kebenaran di bawah A. 46 k. 2 mesti diperolehi. Oleh kerana kebenaran tersebut tidak diperolehi, maka perayu tidak berada dalam kedudukan untuk melaksanakan penghakiman dan kerana itu tidak berhak untuk mengeluarkan notis. Atas alasan ini sahaja, Notis sudah boleh diketepikan.

Case(s) referred to:

AmBank (M) Bhd v. Tan Tem Son & Another Appeal [2013] 3 CLJ 317 FC ***(refd)***

Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 FC ***(foll)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Re Aris Massos Ex p UOL Factoring Sdn Bhd [1998] 4 CLJ Supp 446; [1998] 4 BLJ 446 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Courts of Judicature Act 1964, s. 78(1)
Rules of the High Court 1980, O. 46 r. 2(1)(a)

For the appellant - Foo Joon Liang & Tan Min; M/s Shearn Delamore & Co
For the respondent - Yeoh Cho Kheong & Ho Kok Yew; M/s Ranjit Singh & Yeoh

[Editor's note: For the Court of Appeal judgment, please see Poh Gaik Lye v. AmFraser Securities Pte Ltd [2014] 10 CLJ 79 (affirmed).]

Reported by Wan Sharif Ahmad

JUDGMENT

Ahmad Maarop FCJ:

[1] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Apandi Ali FCJ has since resigned, upon his appointment as the Attoney General of Malaysia.

[2] In this appeal the appellant is the judgment creditor and the respondent is the judgment debtor. This judgment concerns the appeal by the appellant against the decision of the Court of Appeal which overturned the decision of the High Court made on 15 June 2011. In its decision, the High Court reversed the decision of the Senior Assistant Registrar who had set aside the bankruptcy notice upon the application made by the respondent.

[3] The background facts leading to the present appeal are these. On 10 July 1998, the appellant obtained a summary judgment against the respondent in the sum of RM11,482,024.19 with interest at 13% from 17 December 1997 until date of settlement. Based on that judgment, on 18 December 2008 - (ten years and five months after the judgment was obtained), the appellant issued a bankruptcy notice. The particulars of the sum claimed in the bankruptcy notice are as follows:

Judgment sum	RM11,482,024.19
Interest on the sum of RM11,482,024.19 At the rate of 13% per annum from 17.12.1997 - 9.7.2004 (2397 days)	RM9,802,502.93
Costs	RM -
Amount outstanding as at 9.7.2004	RM21,284,527.12

[4] On 21 April 2009, pursuant to its *ex parte* application the appellant obtained an order to extend the validity of the bankruptcy notice (from 18 March 2009 until 17 March 2010) ("extension order"). In the extension order an order of substituted service of the bankruptcy notice was also granted.

[5] On 16 December 2009, the respondent filed an application in the High Court for the following orders: A

(i) that the Bankruptcy Notice dated 18.12.2008 filed by the Judgment Creditor ("Bankruptcy arising from an Order dated 10.7.1998 obtained by the Judgment Creditor *vide* Shah Alam High Court Civil Suit No.: MT1 22-673-1997 ("1998 Order") be set aside; B

(ii) that the Order dated 21.4.2009 allowing extension of the Bankruptcy Notice for a period of twelve months from 18.03.2009 until 17.03.2010 and the substituted service of the said Bankruptcy Notice on the Judgment Debtor ("Order for Extension and SS") be set aside; C

(iii) that this proceeding be stayed pending the hearing of this application.

[6] In the application, one of the grounds given by the respondent for setting aside the bankruptcy notice was that leave for issuance of the bankruptcy notice had not been obtained by the appellant. D

[7] The respondent's application to set aside the bankruptcy notice was allowed by the Senior Assistant Registrar. On 25 July 2012, the learned judge of the High Court allowed the appellant's appeal. The bankruptcy notice was thus reinstated. E

[8] On 30 January 2013, the Court of Appeal allowed the respondent's appeal, set aside the decision of the learned judge of the High Court and reinstated the decision of the Senior Assistant Registrar. In other words, the bankruptcy notice was set aside.

[9] The appellant's application to appeal to this court was allowed on the following questions of law: F

(a) Whether the Bankruptcy Notice stands valid under the provisions of s. 3(2)(ii) of the Bankruptcy Act 1967 when the Judgment Debtor fails to dispute the claim stated in the Bankruptcy Notice as being excessive within 7 days from the date of service of the Bankruptcy Notice. G

(b) Whether the decision of the Federal Court in *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] CLJ 413, which renders a bankruptcy notice, which has been filed after six years from the date of the Judgment, invalid for claiming arrears in interest, continues to be good law in light of the Federal Court decision in *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787. H

(c) Whether a Judgment Creditor is entitled to claim arrears of interest calculated up to six years from the date of Judgment if the bankruptcy proceeding is commenced after 6 years from the date of the Judgment. I

A **Decision Of This Court**

[10] In allowing the respondent's appeal and setting aside the bankruptcy notice, the Court of Appeal gave three reasons. The first relates to a defect in the extension order which the Court of Appeal held to be fatal. It is not disputed that the extension order contained the name of "Citibank Berhad" instead of the appellant's name. As stated earlier, in its application to set aside the bankruptcy notice dated 16 December 2009, the respondent also applied to set aside the substituted service. The appellant sought to remedy the defect by an application to amend the extension order which was allowed by the High Court on 10 March 2010. The reason given in support of the application was clerical mistake and/or accidental slip. The Court of Appeal found that the application for amendment was made some three months after the respondent made her application to set aside the bankruptcy notice. The Court of Appeal opined that the extension order containing the name "Citibank Berhad", could not provide a valid extension because "Citibank Berhad" had no *locus standi* to make that application for the extension of the bankruptcy notice and substituted service. Further, the Court of Appeal held that the service of the bankruptcy notice by the publication of the substituted service order was not a valid service because the substituted service order (which was embodied in the extension order) suffered from the same defect aforesaid. The Court of Appeal ruled that the amendment order dated 10 March 2010 could not revive something which never had a life in the first place. The Court of Appeal also remarked that the mode of application for amendment of the bankruptcy notice and substituted service of the same (by an *ex parte* application) was another disturbing feature which weighed in favour of the respondent. Since at the time the appellant made the application to amend, the respondent had already made her application to set aside the Bankruptcy Notice, there was no reason why the respondent or her solicitors could not be informed of the application. As such the Court of Appeal ruled that "the principle of natural justice must be applied with full force" in the circumstances. The second ground given by the Court of Appeal relates to inconsistent reasons given by the appellant in support of the application for substituted service. In the letter of appointment for service, it was stated that on two occasions of attempted service, the appellant's representative was told that the respondent was not present at the premises. Whilst in the affidavit of the process server it was stated that the premises were closed and the process server's calls were not answered. The Court of Appeal held that that inconsistency could not be brushed aside as petty because when any application was made to the court especially on an *ex parte* basis, an applicant must make full, frank and accurate disclosure to the Court. In this regard the Court of Appeal referred to Practice Note No. 1 which was referred to in *Re Aris Massos Ex p UOL Factoring Sdn Bhd* [1998] 4 CLJ Supp 446; [1998] 4 BLJ 446. The third reason given by the Court of Appeal was that the bankruptcy notice did not conform to the terms of the sealed order of the judgment. This is what the court said:

B C D E F G H I

> Another reason for our decision is the sealed order which in our view is incomplete and unsatisfactory to say the least. It is trite law that bankruptcy notice must be based on the sealed order of the judgment. In this case, it is undisputed that the sealed order merely states '13% interest' and not '13% interest per annum or month' as is done in all orders. So on the face of that order, the Court cannot say that on what basis was interests charged, is it 13% per month or per annum? One must not forget that the primary document to premise a bankruptcy notice is the judgment and when that is not clear, that bankruptcy notice is to say the least suspect. Hence we have no alternative but to hold that the bankruptcy notice did not conform to the terms of the sealed order of the judgment.

[11] In our view, there is another reason (which is independent of the reasons given by the Court of Appeal in its judgment), which is fundamental in nature on account of which the decision of the High Court reinstating the bankruptcy notice could not stand. It is this. It cannot be disputed that the bankruptcy notice was issued more than six years after the judgment was obtained. In fact it was issued some ten years and five months after the judgment was given on 10 July 1998. More importantly, it cannot be disputed that no prior leave of the court to issue writ of execution to enforce a judgment pursuant to O. 46 r. 2(a) of the Rules of the High Court 1980 (RHC) was obtained. This point was specifically raised by the respondent as one of her grounds in applying to set aside the bankruptcy notice. In the affidavit filed in support of her application to set aside the bankruptcy notice she deposed as follows:

> I am advise by my solicitors and verily believe that the BN is bad in law as more than 6 years have lapsed since the 1998 order was obtained and leave from the Court has not been obtained to execute that judgment.

[12] The appellant did not deny that no prior leave to execute under O. 46 r. 2(a) of the RHC was obtained, but contended as follows:

> I verily believe to be true that the said bankruptcy notice is proper and valid in law and leave is not required in the circumstances given that the interest is being claimed only as at 9/7/2004.

[13] The issue of whether leave under O. 46 r. 2 of the RHC was necessary before the bankruptcy notice could be issued because the period of six years from the date of judgment had lapsed, was considered by the learned judge of the High Court who held that leave was not necessary. The learned judge relied on *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787. This is what the learned judge said in his judgment:

> 11. Berkaitan dengan isu sama ada keizinan/leave diperlukan sebelum Notis Kebankrapan dikeluarkan kerana Penghakiman telah didapatkan pada tahun 1998 dan tempoh 6 tahun telah berlalu. Keizinan atas leave tidak diperlukan.
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> 12. Merujuk kepada kes *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787, Mahkamah memutuskan antara lain:

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> Furthermore, if we bear in mind that the words used in our O. 46 r. 2 RHC 1980 and in the English Rules are 'A writ of execution to enforce a judgment ...' clearly a bankruptcy notice or bankruptcy petition cannot be 'a writ of execution.' So, in my view, our Courts have been correct in holding the view that no leave of Court is necessary to issue a bankruptcy notice after six years as required by O. 46 r. 2 RHC 1980.

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[14] In her memorandum of appeal to the Court of Appeal, the first ground specified by the respondent in support of her appeal was that the learned judge of the High Court erred in failing to give effect to the fact that the bankruptcy notice was issued without complying with O. 46 r. 2 of the RHC (See para. 2.1 at p. 32(b) of the Appeal Record vol. 2). However, this critical issue was not dealt with by the Court of Appeal. In holding that leave from the court under O. 46 r. 2 of the RHC was not necessary to issue the bankruptcy notice after the lapse of the six year period from the date of judgment, the High Court had relied upon *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787. In fact in *AmBank (M) Bhd v. Tan Tem Son & Another Appeal* [2013] 3 CLJ 317, relying upon *Lim Ah Hee*, this court held that the phrase "any person who is for the time being entitled to enforce a final judgment" in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to O. 46 r. 2(1)(a) of the RHC prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago. However, *AmBank Bhd v. Tan Tem Son (supra)* was reconsidered by a different panel of this court in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1. This later panel declined to follow *AmBank Bhd v. Tan Tem Son (supra)*. In *Dr Shamsul Bahar v. RHB (supra)*, this court held that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed, must obtain the prior leave of court pursuant to O. 46 r. 2 of the RHC. The court said:

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> With respect, *we could not subscribe to the reasoning in Tan Tem Son. Also, we could not agree that 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago. Rather, we hold that any person who is for the time being entitled to enforce a final judgment in the proviso to s. 3(1)(i) of the BA 1967 must be a person who is entitled to enforce a final judgment without prior leave of court*. In the instant case, judgment was obtained on 10 October 2000. When the BN was issued on 3 January 2011, the judgment was more than six years old. In other words, when the BN was issued, the respondent was not in a position to execute the judgment without the leave of court. Leave should and could have been obtained (see *ex parte Clements* [1901] 1 QB 260, at p 263). In that it was not, such that the respondent was then not in a position to execute the judgment, the respondent was not entitled to issue the BN.

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> By reason of the aforesaid, our answer to the first leave question is in the positive, *that is to say that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed from the date of the judgment, must obtain the prior leave of court pursuant to O. 46 r. 2 of the RHC, now replaced by O. 46 r. 2 of the Rules of Court 2012*. As our answer to the first leave question will dispose of this appeal, we do not see it necessary to answer the second leave question. (emphasis added)

[15] In other words, a person "who is for the time being entitled to enforce a final judgment" in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 must be a person who is entitled to enforce a final judgment without prior leave of court. If when the bankruptcy notice is issued, the judgment was more than six years old, then the judgment creditor is not in a position to execute the judgment without the prior leave of court. In such a case leave under O. 46 r. 2 of the RHC must be obtained. Reverting to the relevant facts of the present appeal, the bankruptcy notice was issued some ten years and five months after the judgment was obtained. Applying the law as pronounced by this court in *Dr Shamsul Bahar v. RHB Bank (supra)* the answer is clear and the eventual outcome of the appeal is inevitable. The appellant was not a person who for the time being entitled to enforce a final judgment in the proviso to s. 3(1)(i) of the Bankruptcy Act 1967. In such a case leave under O. 46 r. 2 of the RHC should have been obtained by it. Since no leave as such was obtained by the appellant, it was then not in a position to execute the judgment. Thus, it was not entitled to issue the bankruptcy notice. On this ground alone the bankruptcy notice must be set aside.

[16] What we have decided thus far is sufficient to dispose of the appeal. In the circumstances we find it unnecessary to the answer the questions of law in respect of which the leave to appeal was granted.

Conclusion

[17] In the result, the appeal is dismissed with costs. The decision of the Court of Appeal is affirmed.